No. 11,911

IN THE

United States Court of Appeals for the Ninth Circuit

CATHERINE O'CONNOR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

HYMAN & HYMAN,
HOWARD B. CRITTENDEN, JR.,
Central Tower Building,
San Francisco, California,
Attorneys for Appellant.

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To the Honorable Above-Entitled Court:

I.

It Is Proper for Counsel for a Defendant in a Criminal Matter to Urge the Client's Constitutional Rights and Assign Error Before the Above-Entitled Court.

The United States Government's brief in this case characterizes Appellant's Brief as a "denunciation" (Pg. 16) and the appeal for the client's Constitutional rights and discussion of error as "bitter," "vituperative," "at times scurrilous" and "at all times wholly unwarranted" (Pg. 16). Counsel for the defense have undertaken to discharge their duty as counsel and officers of this court as fearlessly and as ably as they could, in good faith as they see these vital matters presented in the record.

Canons of Profesisonal Ethics, American Bar Association, provides Canon No. 5 ". . . Having undertaken such defense (of a person accused of a crime)

the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

Canon No. 15. ". . . The lawyer owes 'entire devotion to the interest of the client, warm zeal in maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In every judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy and defense. . . ."

It should be noted that the accused's constitutional rights were subjected to the same type of treatment in the lower court as the Government attempts in its brief before this Honorable Court.

It is no doubt easier for the prosecution to obtain a conviction if defense counsel can be intimidated, and Constitutional rights stripped from an accused without effective protest from defense counsel. In this case the United States Government seeks to censure the defense counsel for urging error in the lower court and for urging the Constitutional rights of the accused.

Where are our Constitutional Rights, if defense counsel cannot urge them with zeal, forcibly and as clearly as possible before the United States Court of Appeals?

Where is the Constitutional Right, Sixth Amendment "to have the assistance of counsel for his de-

fense'' if counsel is reprimanded and accused in such language as the United States Government used in "Brief for the United States'' for urging error to the prejudice of the accused and the client's Constitutional rights?

One of the defense counsel in this case sat as a Military Court judge in Kreis Goeppingen at the start of the occupation; and there was a reluctance of Rechtsanwalts to defend the more serious offenses against the military occupation before the Military Court, for they had learned before the occupation that it was imprudent to defend certain types of cases before the German Courts. One Rechtsanwalt, Dr. Henssler, explained he always inquired first if it were prudent to defend the accused, for after the first warning, the Rechtsanwalt who persisted soon suffered consequences from the disfavor of the Nazi government or The Party. Can it be in this country, it is now imprudent to defend a client's constitutional rights or to urge error before the United States Court of Appeals? If the Government, at the taxpayer's expense, can print such a brief as appears in this case as "Brief for the United States," as a permanent record and memorial in the archives of this Court, then we submit it is imprudent to urge the Constitutional rights of an accused, or assign or urge error before this Honorable Court. If defense counsel, for seeking to protect the Constitutional rights of an accused, and urging error, and appealing to this Honorable Court by the statutory right of appeal, can be censured by the government for observing the basic and fundimental duties of counsel, then it is imprudent to accept employment, and the right to counsel is now an empty phrase.

II.

Computations Based Upon Investigation of Third Person's Books Not in Evidence; and Computations Not Subject to Determination as to the Various Items Nor Subject to Inspection Do Not Meet the Requirements of Fair Play.

The prosecution has set forth a series of impressive figures on page 7 of its brief. These are the figures which were never substantiated, which were based upon work sheets not permitted to be inspected nor examined by the defense nor the jury. Neither the jury nor the defense were ever given the various items that supported the various totals going to make up the alleged income, although demanded on a dozen occasions by the defense during the course of the trial. Figures and totals are no better than the items that go to make them up, or the methods of computations in arriving that those figures and totals. The defense repeatedly demanded the "work sheets" used to arrive at these figures, but never obtained any.

Furthermore, these figures cited by the government witnesses are clearly based in some part upon items determined by the government's witnesses from their investigation of third person's books not in evidence. None of these third persons were witnesses, were sworn, or subjected to cross-examination. The identity of such informers, and the basis of the alleged items, or indeed their amounts were never disclosed; except, that some items of unknown amounts were alleged to have been obtained from unknown records of the Bureau of Public Debt.

Any accusations of the prosecution, any allegations of proof by the prosecution based upon such computations do not meet the basic requirements of fair play, nor due process of law.

III.

The Prosecution's Attempted Explanation of the Discrepancies Between Their First Trial Computations and Their Second Trial Computations Does Not Explain the Greater Increase in "Corrected Business Receipts" Charged in the Second Trial Computations.

The prosecution seeks to justify the difference in testimony between the government investigators as to the amounts of alleged net income by the unsupported bare statements of Agent Krause that he "leaned over backwards" in allowing deductions (Brief, p. 8). But leaning over backwards in allowing deductions does not account for an increase of $1200 to $3600 in "corrected business receipts" in the Krause figures over the Tormey figures (see Appellant's Opening Brief, p. 28, for comparisons and citations into the transcript), if the same basic data and the same methods of accounting (likely to overstate income) be used by those two agents. Of course, the answers lies in determining what items went into what columns and what computations followed,—and these appear only in the "work sheets" demanded by the defense on a dozen different occasions, and refused either examination by the defense or to be put into the evidence.

The added vice appears from the consolidation of various items in the Krause computations which should to the extent of such consolidation reduce the Krause computations of "corrected business income" below the Tormey computations of the same comparable item, for a fair comparison.

IV.

The Prosecution Proved the Authenticity of the "Gray Book" by Comparisons With the Mysterious Check Stubs by Alleged Obliterations Not Before the Jury.

The prosecution, page 6 of its brief, seeks to establish the proof of the execution of the disputed parts of the "gray book" by the alleged similarity to similar obliterations in the defendant's check stubs which were never in evidence. The prosecution contends in its brief that the defendant gave her receipt for the documents but did not produce them in court. The admission of the Gray Book upon the alleged proof is shown in Transcript pg. 80 and 85 et seq, and reprinted in Supplement to Appellant's Opening Brief, pages 16 to 24.

It is interesting to note that Government Agent Krause testified he used the check stubs in his computations begun after the first trial and completed just before the second trial (Transcript pg. 406) but on further cross-examination, changed his testimony and stated he was merely speculating (Transcript pg. 418-420). He must have had the check stubs in his possession to have used them in the computations.

V.

Naming of Deductions Which Statute Permits a Taxpayer to Take by Either Name Is Made a "Red Herring" to Prejudice the Accused.

The prosecution makes much of the misnaming of certain deductions (Brief pg. 8) and the calling of a lawful deduction properly taken as "charitable contribution" or "gambling loss" during the years 1943 and 1942. For the year 1944 when the "standard deduction" was taken, to call a "gambling loss" a "charitable contribution" would merely work to the

disadvantage of the taxpayer, not the government.

A deduction permitted by law, is properly deductible regardless by what name it may be called by a taxpayer. Whether the taxpayer called it "good cause" or "red cross" or "gambling debt" would not defraud the government; nor would it be improper, nor would it be reprehensible.

The Indictment, First Count, alleges "deductions" as "contributions . . . . $152.50." The Prosecution's witness Krause gave the amount claimed for charitable contributions by the Witness at $152 but contends that this is wrong. Tr. pg. 229-230. The Prosecution's Brief, pages 8 and 12, contends that the defendant's return of "contributions" for charity in Exhibit 2 for $152 is false. We want to point out that the prosecution's case is predicated upon the basis that both the figures in the indictment for "contributions . . . $152.50" and the defendant's claim of the same sum in her 1942 return are erroneous. It is predicated upon the basis that the figures in the indictment second count "contributions $255.00" and the defendant's claim of the same sum in her 1943 return are erroneous.

It is indeed a sorry state of affairs when the grand jury alleges certain figures in the indictment that the defendant sets forth in her returns are proper, and the prosecution during the trial then contends that these figures are erroneous and false, and consequently the defendant is guilty of fraud for reporting and entering the same figures charged as the proper amounts for "contributions" in the indictment.

It should be noted that the defendant's testimony

showed contributions to her Catholic Church's poor box, to various contributions solicited of many taverns and which taverns are forced to give sums to various organized charities by reason of social pressure and public opinion, and the defendant paid certain sums for masses at her Catholic Church, in addition to sums claimed.

It should be observed that for the year 1944, the defendant took the "standard deduction," which is allowed, irrespective of the amounts actually contributed to charities; and any entry in the defendant's books as to 1944 as to charities is mere surplusage and would not effect her income tax or its liability. As a gambling loss it is deductible, for the proof was that her gambling winnings including "double or nothing" at the bar with customers was substantial. As "charitable" contributions it was not deductible due to the standard deduction taken. It therefore followed that the taxpayer, not the government, would suffer prejudice by labeling a gambling loss a charitable contribution during 1944.

VI.

The Exceptions Were Properly Made the Subject of Exceptions by the Defendant Before the Jury Retired.

The instructions were settled by the Court during the trial upon a hearing in open court. The prosecution's statement that no exceptions were noted, Brief, page 24, is probably explainable by the fact that the government obtained a "daily" transcript and did not see fit to order this part of the proceedings transcribed. Defendant has ordered, transcripts of the portions of the hearing not transcribed, dealing with the contest over the instructions.

The defendant duly asked that exceptions be noted to the Court's ruling as to the giving of most of the government's proposed instructions and the refusal

to give the defendant's proposed instructions. The Court noted the exceptions.

As soon as the Court reporter has transcribed this portion of the record which has evidently been omitted, although all the record was requested by the defendant, we trust the omission in the record will be cured.

The defendant has attempted to set out the instructions in full given by the court, and those requested by the defendant and refused, in both the assignments of error and in the printed supplement to the Appellant's Opening Brief. We trust we have not misled the Court as prosecution would intimate. In Appellant's Opening Brief a few of the more flagrant errors in the instructions are outlined, and need not be repeated in this brief.

VII.

The Same Disclosure Was Made to Defendant's Accountant Bosserman as Was Alleged to Be Proof of Falsity During the Trial. Having Made a Full Disclosure, She Had a Right to Rely Upon the Professional Skill and Services of Her Accountant.

The prosecution at page 21 of their brief contends that the defendant provided her accountant Bosserman with an alleged false book, Exhibit 5, claiming in the same sentence that she provided him with the "gray book," Exhibit 14, and thus she misled her accountant. The fallacy with the prosecution's argument is that the prosecution's alleged proof of a double set of entries, is predicated solely upon the entries in the Gray Book, Exhibit 14, from July 17, 1942, to August 23, 1942, were alleged entries made at the alleged dates and in the Gray Book, which, with the Black Book covering July 16, 1942, on, were

both claimed by the Government to be given to Bosserman at the time he prepared Exhibits 1 and 2, the 1942 Partnership and individual returns of the Josts. The accountant could not have been misled, for the defendant made, by the prosecution's contention, as full, fair and complete a disclosure to her accountant of the very case the prosecution made proof at the trial.

If the Gray Book, Exhibit 14, contained the disputed entries for July 17 to August 23, 1942, while the prosecution contends the book was in her possession; if she delivered the Gray Book, Exhibit 14, to Bosserman with the Black Book, Exhibit 5, and there were the discrepancies of such large sums for those dates, the accountant must have used the records to make out the returns, and a full and complete disclosure was made by the defendant of the very thing the prosecution contends is their proof and badge of fraud.

Upon the prosecution's own statement of the case, the accused made a full, fair and complete disclosure of all the facts to her accountant; it follows she did not and could not have misled him; and she has a right to rely upon his professional skill and work and make her returns upon his work.

Of course, the evidence is not that clear, and is only the statement most favorable to the prosecution's contentions. The evidence shows that Bosserman testified at the first trial he did not work from the Gray Book in making the partnership returns. The testimony shows that Bosserman, at the first phase of the agent's investigation, supplied the Agent Krause with the Gray Book. Furthermore, there are so many reasons why the Gray Book from the middle of July, 1942, on cannot be possibly the records of the defendant's business, which so clearly

appear in the record, that we have not undertaken to outline them in this Reply Brief. We fully understand the draftsman's position in the prosecution's brief, for he has fallen into the same method of thinking as defense counsel—that the disputed writings were not in the Gray Book until much later. The disputed writings not being in the Gray Book at the time the government contends Bosserman used it to make out the reports for the defendant and her husband, it is arguable that the defendant misled her accountant by providing her accountant Bosserman with but one set of figures—the Black Book, Exhibit 5, for him to prepare the husband and wife returns upon which the first count of the indictment is based. However, if the disputed writings in the Gray Book, Exhibit 14, were in the Gray Book during 1942, as the prosecution now contends, it follows that the discrepancies would immediately become apparent, and a full, fair and complete disclosure of the alleged "true income" would have been made. The accountant must then have made his return upon the very evidence offered by the prosecution as the sole basis of their case before the jury.

If the disputed items in the Gray Book, Exhibit 14, were not in it until after tax time in 1943 when 1942 returns were made out; and Government witness Bosserman held that book from tax time, 1943, until he delivered it to the Agent Krause, it is quite obviously nothing upon which the prosecution can predicate its alleged public offense against the accused. We believe that if the Court will examine the original books, Ex. 5 and Ex. 14, and actually compare the two writings themselves—as the jurors should have been instructed they were entitled to under Defendant's proposed Instruction No. 4, 28 USCA 638, the Court can see most vividly the error

of the Court in refusing the instruction, the miscarriage of justice thereby, and the damage of the defendant's case, and contention as to the disputed writing.

If the writing were in the Gray Book, Exhibit 14, at the end of 1942 or early 1943, then the defendant made a full, fair and complete disclosure to her accountant by delivering to him that book as the prosecution contends she did, and the alleged case of fraud falls of its own weight and from the Government's proof.

VIII.

The Failure to Provide the Bill of Particulars Resulted in Serious Prejudice and Surprise.

The Prosecution, in its brief, pages 9-11, contends there was no prejudice and the accounts were offered the defendant; and contends because it was the second trial that there were the same witnesses with minor exceptions.

The first trial was had upon the Agent Tormey computations and we trust we have demonstrated in the opening brief the material difference between those amounts and the amounts sprung at the second trial upon the Agent Krause computations. A reading of the record will show the material differences in testimony from the first trial where repeated references appear to the first account of the prosecution and its differences from the second. See Appellant's Opening Brief, pages 4 to 8, 28 for tabulations of some of these differences. See pages 5 to 15, Supplement in Appellant's Opening Brief, for proceedings for Bill of Particulars and affidavits in support.

No offer of any detailed records or schedules were ever made to the defense as contended at page 11 of prosecution's brief, and citation of Record pages

484-5, Transcript 414-5. That was merely where, on cross-examination Agent Krause was asked for the amounts allocated in the breakdown spent for entertainment in connection with the business of the defendant, the witness answered that in his schedule of all disbursements made, he broke them down into deductible and non-deductible items, into capital and loan items but not classified as entertainment items. No offer was made to defense counsel to inspect them, and repeated demands were made to inspect them and to put them into the evidence. Indeed the first demand for the work sheets was made during the noon recess and demand in Open Court for the order for permission to examine the work sheets appear on Transcript, pg. 447-452. Again it was made, Tr. 478, the following morning upon the commencement of the next day of trial. See Opening Brief, pages 33-6, and Suppl., pg. 43-46, 50-52, and 55. It is interesting to note that at no time did the prosecution counsel contend that defense had refused to examine the Krause "work sheets" nor put them into evidence as now claimed in prosecution's brief, pages 9 to 11. They knew that defense counsel had at the first trial examined the Tormey work-sheets, and their case would not stand similar inspection if the defense were granted the same opportunities to show to the jury how the Krause work-sheets would not and could not support the figures upon which the prosecution built the second trial. We note with interest the prosecution's contention, on page 11 of their brief: "The Government refused to accede to the latter request, as the thousands of items involved would have but further encumbered the record and they were nothing but recapitulations of matters already in the record." Defendant was *surprised* to learn that the government's figures

involved matters determined from outside investigation and not confined to the records of the case. Tr. pg. 646-7. Indeed, this was the only way that such alleged income could have been arrived at. See affidavits for Bill of Particulars, Suppl. pages 7 to 15; but the defense was misled by the testimony of Government counsel on the bill of particulars, see Tr. of Sept. 2, 1947, on Bill of Particulars proceeding.

It should be observed that when an income tax indictment allegations can be proved by testimony of a Government agent that the defendant made such and such income, and the Government can refuse the right to the defense to inquire into the items that made up the computation and to see what items went into income and which are allowed as deductions, and the computations thereon, and the Court will prevent such inquiry and testimony, a mere charge of guilt carries through to a conviction and the essence of due process of law does not exist in such trials. This is trial by denunciation.

"Denunciation" is a term of the "civil law" used on the continent of Europe meaning the charge laid before the public prosecutor upon which the criminal proceedings are usually started.

Bouvier's Law Dictionary (Banks Ed.) P. 292.
Black's Law Dictionary, (2nd Ed), Pg. 354.

A trial by denunciation means that the mere lodging of the charge results in prosecution and conviction; the denunciation is in reality the determination of guilt and the rest follows as a formality. For example, a charge is lodged by certain Government agents; and this denunciation is lodged in the dossier of the accused and the rest is a mere formality from the review by the various higher offices through the prosecutor's office, and the denunciation suffices to con-

vict the accused and criminality and disability of conviction and sentence follow.

We have gone to great lengths in our Opening Brief to point out how and why this is what obtains in the instant case. We would be remiss in our duty as counsel if we did less. Now it appears we stand censured by our United States Government in a printed memorial in the archives of this Honorable Court. Is it now imprudent to urge error or plead an accused's Constitutional rights before this Honorable Court? Is this now reprehensible? Will diligence and good judgment require counsel to forebear to plead error in the trial of an accused or to urge the constitutional rights before this court?

IX.

The Laws of California as to Community Property Are Necessary for the Determination of the Income of the Defendant.

There is no issue that the domicile of the defendant and her husband were in California from their marriage in early 1942 to dissolution of the marriage in the middle of 1944. The law of the domicile of the parties, California, and the situs of all their property, real and personal, also California, governs their rights. All property acquired after marriage, with certain exceptions, is Community Property.

Civil Code 161a, 164

It is a general rule that money borrowed on personal security by a husband or wife is community property.

Mosesian v. Parker, 44 Cal. App. 2d 544, 112 P. (2d) 705;
Moulton v. Moulton, 182 Cal. 185, 187 P. 421.

Earnings of a wife from her personal services while living with her husband are community property.

Martin v. Southern Pac. Co., 130 Cal. 285, 62 P. 515;
Henry v. Hibernia Sav. & Loan Soc., 5 Cal. App. 2d 141, 42 P. (2d) 395.

And the proceeds of earnings, community property, are also community property.

Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P. (2d) 609.

Where community property is commingled, and each part is not clearly ascertainable and traceable, the presumption is in favor of community property.

Estate of Fellows, 106, Cal. App. 681, 289 P. 887;
Falk v. Falk, 48 Cal. App. 2d 762, 120 P. (2d) 715.

Community funds, as for example earnings that are community, used in improving the separate property of a spouse retain their character as community property.

Provost v. Provost, 102 Cal. App. 775, 283 P. 842;
Chandler v. Chandler, 112 Cal. App. 601, 297 P. 636.

Where portion of the accumulations or income are services or skill that are community property, those portions are community although the business was separate property of a spouse.

Lawrence Oliver v. Comm'r., 4 Tax Court 684;
Periera v. Periera, 156 Cal. 1, 103 P. 488;
In re *McCarthy's Estate,* 127 Cal. App. 80, 15 P. (2d) 223.

The testimony of both the Government witness Jost and the defendant were that the husband dur-

ing the entire time he lived with the accused, took his earnings and used them in the business and drew what he needed from the business. Half the business, claimed by the prosecution to be of little value in January, 1942, was separate property of the accused. The other half was acquired by money borrowed upon personal credit, and from saved earnings of the community. The principal income was the services and skill of the husband and wife in running the tavern. For the first time in California law, it appears to be urged by the prosecution that because the accused used her first married name of Larson (Pros. Brief 25), that her earnings while living with her husband were not community property.

The fact remains that under California law, the wife's interest in community property is a vested one-half interest, which she must report as income. The other half is income of the husband which he must report. He has the management and control of the community property. Yet the prosecution contends that the law of husband and wife in the domicile of the parties and the situs of the property, California, is no part of the case and the wife is chargeable with all the income of the community, and even the husband's earnings during 1942 prior to their marriage, for the purpose of computing income tax upon a charge of feloniously attempting to evade the income tax.

The prosecution's case is predicated upon the assumption that gift of community property ("relinquishment") makes receipt of a gift taxable income. The prosecution's case is predicated upon the assumption that a wife who follows the usual practice in divorce cases of relying upon the presumption that property in her possession is presumed to be

separate property, and alleges that at the time she filed the action for divorce that no community property remains (it having been spent or transferred into separate property) must be chargeable with all the income of the husband, and she is guilty of a felony for failure to report his, her divorced husband's income.

CONCLUSIONS

The prosecution has failed to comment upon the failure of the Government to call Agent Tormey; that the defendant did so and was not permitted to examine him as an adverse witness. See Appellant's Opening Brief, pages 14 to 18. We take it that this point is conceded.

We trust in our limited space of a Reply Brief, that we have demonstrated a few of the fallacies and erroneous contentions that appeared in the prosecution's brief.

We trust the record supports amply the accused's request for a directed verdict on each count, and her specifications of error as we have attempted to point out in our limited space.

HYMAN & HYMAN,
HOWARD B. CRITTENDEN, JR.,
Central Tower Building,
San Francisco, California,

Attorneys for Appellant.